[HIGH COURT OF AUSTRALIA.]

PAKENHAM UPPER FRUIT COMPANY LIMITED . . . . . Appellant;
Plaintiff,

AND

CROSBY . . . . . Respondent.
Defendant,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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Melbourne, *May* 6.

Sydney, *Dec.* 15,

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.

Specific Performance—Company—Articles of association—Agreement by member to deliver produce to company—Injunction—Discretion of Court.

By the articles of association of a company whose business was, among other things, to market the fruit grown by its members, it was provided that each member should deliver to the company at one of its packing sheds 95 per cent of his fruit immediately after each variety thereof should be ready, suitable and fit for harvesting or picking but not later than a certain date in each year.

Held, that, assuming that an obligation in those terms was imposed on each member of the company, it was not one in respect of which the Court should, in the exercise of its discretion, at the instance of the company grant specific performance or an injunction.

Decision of the Supreme Court of Victoria (*Macfarlan* J.) affirmed.

Appeal from the Supreme Court of Victoria.

An action was brought by the Pakenham Upper Fruit Co. Ltd. against George Fenwick Crosby in which by the indorsement on the writ the plaintiff claimed "an injunction to restrain the defendant, who is a shareholder of the plaintiff Company, from delivering to

any person, company or corporation other than the plaintiff, the defendant's crop of apples for the present season capable of being marketed and ready, suitable and fit for harvesting and/or picking and grown on his property known as Stratton Vale to the extent of 95 per cent of the said crop," and " specific performance by the defendant of his agreement with the plaintiff Company to deliver to the plaintiff Company 95 per cent of his fruit crop of apples for the present season capable of being marketed and ready, suitable and fit for harvesting and/or picking and disposable for sale grown on his property known as Stratton Vale." It was stated in such indorsement that " the said agreement is constituted by the defendant's written application for shares in the plaintiff Company dated 13th November 1918, the letter of allotment of the said shares to the defendant, an agreement under the hand and seal of the defendant dated 25th January 1919 and art. 5A of the amended articles of association of the plaintiff Company." By the agreement under seal dated 25th January 1919 the defendant agreed and acknowledged himself bound for as long as he should be a shareholder to deliver to the Company in due season 95 per cent of his fruit crop disposable for sale in accordance with art. 5A of the amended articles of association of the Company. By the memorandum of association of the Company it was provided by clause 3 that the objects for which the Company was established were (*inter alia*) :— " (a) The Company is to be established on the co-operative principle. . . . (h) To establish a depot or depots in Melbourne and other centres if deemed advisable under the management of an officer or officers of the Company who will conduct sales or any other business on behalf of the Company. . . . (k) To act as general agent for members of the Company and others in the acquisition, purchase, sale and disposal of fruit and other produce. . . . (t) To purchase or otherwise acquire all or any part of the business, assets, shares or liabilities of any other Company, partnership or person formed for all or any part of the purposes within the object of this Company and to conduct or liquidate and wind up the same. . . . (y) To unite or amalgamate with or absorb any other Company having objects altogether or in part similar to this Company." Art. 5A of articles of association as amended in December 1922 was as follows,

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so far as is material :—" Each member . . . (i.) shall hold a number of shares equal to the number of acres of planted land in bearing owned, occupied, managed or leased by him or on his behalf, up to 100 acres planted to apples and/or pears . . . (ii.) shall deliver to the Company at one of its packing sheds 95 per cent of his said fruit immediately after each variety thereof is ready, suitable and fit for harvesting or picking, but not later than the 15th day of June in every year or the date of the closing for business of the packing shed situated nearest to the shareholder's land in bearing. Provided always and it is agreed that (i.) a member may during the month of February in any year give to the Company eighteen calendar months' written notice of his desire to determine or discontinue his obligation to make such delivery of his fruit as aforesaid; and in such case immediately after the expiration of such notice such obligation shall be void and of no effect; (ii.) a member desirous of determining or discontinuing his obligation to make such delivery of fruit as aforesaid shall in his said notice to the Company authorize the directors to sell on his behalf all his shares in the Company at a fair minimum selling price . . . provided, however, that the directors may, instead of making such sale in manner aforesaid, require the member to surrender his shares to the Company at a sum to be ascertained as mentioned in this clause." Art. 124, as amended, was as follows : " Without prejudice to articles 5A and 6, the Company shall handle and market the whole of the fruit supplied by the shareholders provided always that the directors or their manager shall have power to refuse to receive any fruit which they or he shall consider unsuitable or unfit and in this matter the decision of the directors or manager as the case may be shall be final binding and conclusive." Art. 124A was as follows: " In and between the months of November and June in any year the directors or their manager or other duly authorized representative or representatives may at all reasonable times in the day-time enter upon the planted land of any member and inspect the growing fruit crop thereon."

The action was heard by *Macfarlan* J., who dismissed it with costs.

From that decision the plaintiff now appealed to the High Court.

Cohen K.C. and *Sanderson*, for the appellant. The appellant Company had power under sec. 21 of the *Companies Act* 1915 (Vict.) to alter its articles, and the amended articles bound the respondent as an agreement (*Hickman* v. *Kent or Romney Marsh Sheepbreeders' Association* (1)). By the amended art. 5A the agreement which had been unreasonable was made reasonable and the respondent, by his conduct, affirmed it as being part of his contract. There is no authority in support of the view that the exercise of the power to alter the contract so as possibly to make it reasonable invalidates the contract.

Walker (with him *McLennan*), for the respondent. Art. 5A is not authorized by the Act or by the memorandum of association, and is therefore *ultra vires*. A company cannot by its articles impose on its members any liability except in respect of the amount payable on the shares and matters incidental thereto. It is only in the case of an unincorporated association that it has been held that there is power to make such a regulation as art. 5A (see *McEllistrim* v. *Ballymacelligot Co-operative Society* (2); *Hickman* v. *Kent or Romney Marsh Sheepbreeders' Association* (1)). The purpose of articles is to regulate the management of the company and not to impose liabilities upon members. A company under the *Companies Act* has not necessarily the same incidents as a corporation at common law (*Palmer's Company Precedents*, 12th ed., vol. I., pp. 29, 30). A company cannot by altering its articles force upon a member a contract into which he has not himself entered (*In re Anglo-Moravian Hungarian Junction Railway Co.*; *Dent's Case* (3)). The original agreement with the respondent was unreasonable and void; and as altered by art. 5A is still unreasonable and is void, even if the alteration was within the power of the appellant Company. The fact that according to its memorandum the appellant Company was established on the co-operative principle does not imply that there should be a prohibition against members dealing with other parties. The statement of the objects in the memorandum is for the protection of the members as well as of the public (*Cotman* v. *Brougham* (4)). The agreement is not in itself reciprocal and the

(1) (1915) 1 Ch. 881.
(2) (1919) A.C. 548.
(3) (1873) L.R. 8 Ch. 768.
(4) (1918) A.C. 514. at 520.

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Court will not enforce it by specific performance or injunction. [Counsel also referred to *Blackett* v. *Bates* (1); *Powell Duffryn Steam Coal Co.* v. *Taff Vale Railway Co.* (2); *Dominion Coal Co.* v. *Dominion Iron and Steel Co.* (3).]

Cohen K.C., in reply. The appellant Company's objects according to the memorandum are co-operative, and the articles explain the memorandum (*In re Anglo-Australian Investment, Finance and Land Co.* [*No.* 1] (4)). That being so, art. 5A is a contract binding on members (*Gore Bros.* v. *Newbury Dairy Co.* (5)). The power to reject fruit is so limited that the contract cannot be said not to be reciprocal. The appellant is entitled to specific performance and injunction (*Kerr on Injunctions*, 5th ed., p. 429). An injunction can be granted notwithstanding that a penalty for breach of the contract is imposed by the articles (see *Kerr on Injunctions*, 5th ed., p. 465).

Cur. adv. vult.

Dec. 15.

The following written judgments were delivered :—

KNOX C.J. By the writ in this action the appellant claimed (1) an injunction to restrain the respondent from delivering to any person other than the appellant the respondent's fruit crop of apples for the season of 1924 capable of being marketed and ready, suitable and fit for harvesting or picking grown on his property known as Stratton Vale to the extent of 95 per cent of the crop, and (2) specific performance by the respondent of his agreement to deliver to the appellant Company 95 per cent of such fruit crop capable of being marketed and ready, suitable and fit for harvesting or picking grown on Stratton Vale. The agreement is alleged in the writ to have been constituted by certain documents including art. 5A of the amended articles of association of the appellant.

Assuming, without deciding, that a valid binding agreement was constituted by the articles of association as amended, such agreement embodied the provisions contained in clauses 124 and 124A of the

(1) (1865) L.R. 1 Ch. 117, at p. 125.
(2) (1874) L.R. 9 Ch. 331, at p. 335.
(3) (1909) A.C. 293.
(4) (1893) 14 N.S.W.L.R. (Eq.) 97.
(5) (1919) N.Z.L.R. 205.

articles. By clause 124 the directors or their manager are empowered to refuse to receive any fruit which they or he shall consider inadvisable to receive; and by clause 124A the directors or their manager or other duly authorized representative may at all reasonable times between the months of November and June in any year enter on the planted land of any member and inspect the growing fruit crop thereon. It is clear from the statement of these provisions that the agreement assumed to have been established is one which, having regard to previous decisions, is not a proper subject of a decree for specific performance.

But it is contended that, even if the agreement cannot be specifically enforced, the Court may still grant an injunction to restrain the respondent from selling more than 5 per cent of his crop to persons other than the appellant and thus preventing the performance of his undertaking to deliver 95 per cent of his crop to the appellant. The practical effect of such an order would be to compel the respondent to perform the agreement to deliver 95 per cent of his crop to the Company. In this case the agreement contains no express stipulation binding the respondent not to sell his crop or any part of it to persons other than the appellant, but it is said that such a stipulation should be implied from his agreement to sell 95 per cent to the appellant and that the agreement, though affirmative in form, is negative in substance. It cannot be denied that the sale by the respondent of more than 5 per cent of his crop to persons other than the appellant is inconsistent with the performance of his obligation to sell 95 per cent to the appellant, but, in my opinion, this is not sufficient to entitle the appellant to the injunction claimed.

This agreement, as I have pointed out, is of such a nature that it cannot be specifically enforced, and the application for an injunction is in effect an application for the specific enforcement of the agreement. I think the rule to be applied in such a case is correctly stated in *Kerr on Injunctions*, 5th ed., at p. 476, as follows: "If an agreement affirmative in form is of such a nature that it cannot be specifically enforced, and the application for an injunction is in effect and spirit an application for a decree for specific performance, the Court will not import a negative quality into the agreement, but will leave the plaintiff to his remedy by damages."

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In this view of the case it is unnecessary to deal with the other points raised.

In my opinion the appeal should be dismissed.

ISAACS AND RICH JJ. The appellant, the plaintiff in the action, is a limited company incorporated and registered in 1918 under the Victorian *Companies Act* 1915, and the respondent, the defendant, is a shareholder in the Company. The action was commenced on 18th February 1924 and as amended by order dated 25th February 1924 the appellant's claim made was twofold. It was, first, for an injunction to restrain the respondent from delivering to anyone other than the appellant the respondent's "fruit crop of apples for the present season capable of being marketed and ready, suitable and fit for harvesting and/or picking and grown on his property known as Stratton Vale to the extent of 95 per cent of the said crop." The second claim was for specific performance by the respondent of his agreement with the Company to deliver the fruit described as above mentioned. The agreement was alleged to be constituted by the defendant's written application for shares dated 13th November 1918, the letter of allotment, an agreement under seal dated 25th January 1919, and art. 5A of the amended articles of association of the Company. There was no claim for damages. The learned Judge who heard the case (*Macfarlan* J.) gave judgment for the defendant with costs, and the Company has appealed.

As the articles stood until amendment in December 1922, the regulations relevant to the circumstances of this case were clearly obnoxious to the decision of this Court in *Heron* v. *Port Huon Fruitgrowers' Co-operative Association Ltd.* (1). The amendments made constitute an endeavour to avoid the legal difficulties declared by that case, and the present action is for the purpose of enforcing the provisions of the new regulations by action in the ordinary way suitable for contracts between independent individuals. The learned primary Judge held the alleged agreement invalid for reasons he gave.

If it were necessary to pronounce definitely on the question whether art. 5A of the present articles of association constitutes a contract binding the Company on the one hand and the respondent on the

(1) (1922 30 C.L.R. 315.

other as if they were wholly independent entities, there would be some serious considerations to take into account. Some of these are stated in *Heron's Case* (1). If those are sought to be affected by the contents of the memorandum, par. 3 (b), it would be necessary to determine the effect in point of construction of sub-pars. (h), (t) and (y) of that paragraph. It would also be necessary to have regard to the observations of Lord *Parker* and Lord *Wrenbury* in *Cotman* v. *Brougham* (2) in order to determine, notwithstanding the conclusiveness of the registration as being in compliance with the Act, whether upon proper construction par. 3 (b) was the statement of an "object" within the meaning of sec. 11 of the statute, and how far it controlled the question of art. 5A. For instance, it would hardly be contended that, if the memorandum contained a paragraph stating that packing should take place in June or that the manager should receive £1,000 a year, that would be an "object" of the Company. It is well established that the memorandum of association is the *charter* of the company and the articles of association are the regulations for its *internal management*.

But these very complex questions are unnecessary to be solved because, even conceding for the purpose of argument the validity of art. 5A and that it is obligatory on the respondent, not merely as a shareholder in relation to the internal management of the Company, but also as an individual in relation to his external conduct of his own business and, as to art. 124A, to his right to privacy on his own property, it is still impossible to maintain the claim to specific performance or injunction, and even, in the circumstances, to damages. And this for two reasons—one procedural and curable but fatal unless cured, and the other of a substantive nature and incurable. The first arises out of the fact admitted. It is admitted, as stated in the transcript, "that defendant has sold or agreed to sell the whole of this season's crop to persons other than the plaintiff." It is further "admitted by Mr. *Walker* that Millis is the man to whom defendant sold, and that defendant has sold fruit and has no intention of delivering to plaintiff." Neither Millis nor any other person as purchaser from the respondent is a party to this action. But in the absence of the parties to whom the respondent sold, the

(1) (1922) 30 C.L.R., at pp. 340-342. (2) (1918) A.C. 514.

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Court cannot grant the relief prayed. This is clear on general principles; and, if an express recent authority is needed, it is found in *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1), a decision of the Court of Appeal.

As to the second and substantive reason, there may, as was done by *Macfarlan* J., be at once cleared away what is referred to in the claim as "an agreement under the hand and seal of the defendant dated 25th January 1919." Among other reasons, it had no consideration, it was inoperative by the repeal of old art. 5A, and the obligation, if any, which, if created, was superseded by the new relations.

Confining attention, then, to the new art. 5A, sub-art. (ii.) says that each member "shall deliver to the Company at one of its packing sheds 95 per cent of his said fruit immediately after each variety thereof is ready, suitable and fit for harvesting or picking, but not later than the 15th day of June in every year or the date of the closing for business of the packing shed situated nearest to the shareholder's land in bearing." That places or purports to place an obligation on "each member." And it is that obligation (if any) in respect of which "specific performance" is claimed.

Before going further, it may be observed that "specific performance" in relation to such an obligation is an inaccurate use of the term, though frequently so used. Lord *Selborne* in *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.* (2) and Lord *Macnaghten* in *Tailby* v. *Official Receiver* (3) have clearly expounded the distinction between "specific performance" in the true sense and ordering something to be done "in specie." It is of some importance in this case to note the distinction because, though as is said "equitable relief approximate to specific performance" may be given in the second class, yet "the peculiar doctrines of the Court as to the specific performance of executory contracts do not necessarily apply to the other forms in which the Court grants specific relief" (see *Fry on Specific Performance*, 5th ed., pars. 38, 43, 841).

There is no doubt the present case is of the latter class. The legal

(1) (1901) 2 Ch. 37, at p. 51.
(2) (1873) L.R. 16 Eq. 433.
(3) (1888) 13 App. Cas. 523, at p. 547.

relative positions of the parties are finally settled, and all that can be asked is that effect shall be given to whatever legal rights have arisen. The distinction has importance for the reason that before injunction can be applied some equity attracting it must be shown. In cases of true specific performance the equity is the obligation of placing the parties in the relative legal positions contemplated. In the second class the equity must be sought in some other consideration appropriate to the actual legal relative situations of the parties.

The present, then, being of the second class, we have to examine the nature of the relative legal positions of the parties. The obligation on the member declared by art. 5A is (a) as to a quantity—95 per cent neither more nor less—very difficult to ascertain; (b) as to times which necessarily vary; (c) as to qualities and conditions which are unprecise and depend greatly on personal opinion and changing circumstances; (d) with a time limit dependent on the mere determination of the Company as to closing a packing shed. That obligation, so far, has no reciprocal obligation on the Company. The latter has to be found elsewhere, and will be referred to presently.

The first point is this: Is the obligation by reason of its nature and the whole circumstances appropriate for specific relief, approximate to specific performance? The nature of the obligation even apart from the effect of its performance is, as shown, of a very indefinite character. It is spread over a period indeterminate except by a possible adherence to 15th June, and, properly speaking, that is not definite. It depends on so many vagaries and shifting possibilities that no order in the nature of specific performance—using that term in the widest sense—could be observed with any assurance that the grower was doing all the Company was entitled to have done and yet was preserving his own rights. The Court could never be sure that it was in a position to enforce its order without injustice.

But when the respondent's obligation is complemented with that of the Company in return, the unsuitability of a specific order is still more apparent. Supposing the grower to send in exactly 95 per cent of his crop, and otherwise to act in compliance with his obligation as far as he can judge, what is to happen? Art. 124

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provides: "Without prejudice to arts. 5A and 6, the Company shall handle and market the whole of the fruit supplied by the shareholders provided always that the directors or their manager shall have power to refuse to receive any fruit which they or he shall consider unsuitable or unfit and in this matter the decision of the directors or manager as the case may be shall be final binding and conclusive." It is useless to refer to the additional complications created by arts. 6, 7 and 124A, except to quote the latter: "In and between the months of November and June in any year the directors or their manager or other duly authorized representative or representatives may at all reasonable times in the day-time enter upon the planted land of any member and inspect the growing fruit crop thereon." That regulation apparently creates an obligation incidental to art. 5A, forming a sort of irrevocable licence attached to an interest. How may one translate the reciprocal obligations of the Company as settled by art. 124? They are to conduct business operations of an agency nature in Australia and beyond in respect of fruit delivered. But the obligation is limited to just such fruit as the directors or their manager in their uncontrolled discretion think fit to accept. The obligation rests entirely upon the unqualified discretion and judgment of the directors or their manager. There is no appeal. (See *R.* v. *Demers* (1), *Willard, Sutherland & Co.* v. *United States* (2) and *Bannister* v. *Heyman* (3).) And there is no certainty. Weather, markets, opportunity and so on may determine the directors or their manager to leave an unspecified quantity even of the 95 per cent in the hands of the grower.

Now, assuming, as this judgment does for the purpose of argument, that, notwithstanding this vague and uncertain result, there exists technically a valid binding agreement to run all the risk mentioned, it seems unarguable that the Court should by a process of equitable interposition, discretionary in the sense of doing what is nearest to justice in the circumstances and nothing highly unreasonable (*Stewart* v. *Kennedy*, per Lord *Macnaghten* (4), and *Watson* v. *Marston* (5)), compel the grower, at the peril of imprisonment, to observe as

(1) (1900) A.C. 103.
(2) (1923) 262 U.S. 489, at p. 493.
(3) (1924) 34 C.L.R. 243.
(4) (1890) 15 App. Cas. 75, at p. 105.
(5) (1853) 4 DeG. M. & G. 230, at pp. 239, 240.

well as he thinks he can the tortuous scheme framed by the regulations.

Consequently the relief by way of "specific performance," as it is termed, which implies ordering the respondent to do something, is inappropriate.

Failing that, the appellant claims an injunction. That remedy is asked for manifestly on the basis that, though there is no "express" negative undertaking, that is, that the grower will *not* deliver to other persons, there is an "implied" negative stipulation involved in the affirmative obligation to deliver 95 per cent to the Company. How far an injunction is a proper remedy where neither specific performance nor its approximation is available is not yet a closed question so far as an express decision of a Court of appeal has been brought to our notice. Up to 1873 a very large power was exercised by Courts of equity to grant injunctions in aid of *express* negative stipulations. *Lumley* v. *Wagner* (1) led the way. But Lord *St. Leonards* said (2): "The jurisdiction is not to be extended," and even the jurisdiction he limited by the words "in the administration of such an equity," meaning the equity arising from not leaving a negative stipulation to the mere chance of any damages a jury may give. In 1873 Lord *Selborne* in the *Wolverhampton Case* (3) stated his opinion that *Lumley* v. *Wagner* should not be extended, and added that he thought the proper quest was the substance and not the wording, and, if the substance of the obligation was negative, then, if it were a matter in equitable jurisdiction, then and only then an injunction should be granted. *Jessel* M.R. was of that view in *Fothergill* v. *Rowland* (4). In 1883 in *Donnell* v. *Bennett* (5) *Fry* J. was personally convinced that Lord *Selborne's* view was right, and that the line of demarcation of injunction or no injunction, once the equitable jurisdiction otherwise attached, was the adequacy or inadequacy of damages. Nevertheless, and though expressing the hope that the Court of appeal would say so, he as Judge of first instance felt bound by precedents to hold to the verbal doctrine, and to act on the mere basis of the presence of a negative clause. If this be the true principle, it necessarily follows that the appellant must fail because here there is no negative clause.

(1) (1852) 1 DeG. M. & G. 604.
(2) (1852) 1 DeG. M. & G., at p. 619.
(3) (1873) L.R. 16 Eq. 433.
(4) (1873) L.R. 17 Eq. 132.
(5) (1883) 22 Ch. D. 835.

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But later cases, such as *Metropolitan Electric Supply Co.* v. *Ginder* (1), show, as *Buckley* L.J. says, that "the cases since that . . . have gone to show that that which Lord *Selborne* says would be the true principle if it should eventually be adopted by this Court, has really now been adopted by this Court." His Lordship acted upon that principle, namely, that the substance should be regarded and not the mere words. We think that that principle—which has the assent of Lord *Selborne* L.C. (whose views, had he not been merely sitting as the Court of first instance, would have governed *Donnell* v. *Bennett* (2)), of *Jessel* M.R., *Fry* J. and other Judges, including Lord *Wrenbury* (when *Buckley* J.)—should now be accepted.

The appellant's right to injunction must, therefore, be further explored. There is a very important case bearing on this subject, *James Jones & Sons Ltd.* v. *Earl of Tankerville* (3), where Lord *Parker* (then *Parker* J.) had to consider the subject. In that case the learned Judge granted an injunction to prevent the defendant from breaking his contract, even though the Court might not be able to command mutual observance of the contract by compelling the plaintiff to perform his part of the bargain. That distinguished the case from "specific performance" in the strict sense. The Court apparently based the decision on the principle stated by Lord *Macnaghten* in *Tailby* v. *Official Receiver* (4) in the words: "The Court is merely asked to protect rights completely defined as between the parties to a contract, or to give effect to such rights . . . by granting an injunction." Lord *Parker* found that by reason of the contract, which was the "executed contract" in that case, a right in equity existed, and, as equity itself created the right, so it would protect it, irrespective of further performance of obligations. "In a sense," said the learned Judge (5), that might "be called relief by way of specific performance, but it is not specific performance, in the sense of compelling the vendor to do anything." The passage at the foot of page 443 and down to line 13 of page 444 is fully explanatory of the position.

What is the equity to be protected here, or what are the equitable considerations upon which the legal right is to be specially protected

(1) (1901) 2 Ch. 799, at p. 806.
(2) (1883) 22 Ch. D. 835.
(3) (1909) 2 Ch. 440.
(4) (1888) 13 App. Cas., at p. 547.
(5) (1909) 2 Ch., at p. 443.

by equitable remedy ? There is no equitable right to be protected. Whatever rights exist are legal. The damages which at best could be sustained by the Company are admittedly trifling. Damages as a form of relief are not sought. They were refused before the learned primary Judge, and that would be a sufficient reason for refusing them now. But if they had been asked for, then on the ordinary common law basis they could not have been recovered. The time for performance had not arrived ; there had, therefore, not been, and could not be even up to this moment, a breach of the contract. There was certainly a repudiation, which could have been by election turned into a rescission of the contract with a right of action for anticipatory breach. But, so far from accepting it as such, it was refused, and specific performance was claimed and is still persisted in, and that is wholly inconsistent with a right to common law damages for breach of contract.

But, said learned counsel for the appellant, the real damage is not the damage to the Company but to the respondent's fellow members. That is, the damage pointed to is the damage suggested to the members not as shareholders but as growers—damage in their respective individual enterprises as proprietors of orchards, and not as members of an agency company. That is outside the legal purview of this case, where the Company is not opposing but seeking the active equitable interposition of the Court. Even as against companies the principle is generally sound (see *Fry on Specific Performance*, 5th ed., par. 428 ; *Hawkes* v. *Eastern Counties Railway Co.* (1), citing *Edwards* v. *Grand Junction Railway Co.* (2)). But where the Company is plaintiff the matter is stronger, and, on the whole circumstances, quoting the words of *Bruce* L.J., approved by Lord *Cranworth* L.C. in *Shrewsbury and Birmingham Railway Co.* v. *London and North-Western Railway Co.* (3), " the contract, whether legally valid or invalid, is one which a Court of equity ought not to be active in enforcing."

The appeal should be dismissed.

GAVAN DUFFY AND STARKE JJ. We have had the advantage of reading the opinion prepared by our brother *Isaacs*, and of considering

(1) (1852) 1 DeG. M. & G. 737, at p. 754.
(2) (1836) 1 My. & C. 650, at 674.
(3) (1857) 6 H.L.C. 113, at pp. 140, 141.

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the cases which he has collected. Many of them were not referred to upon the argument before us. The authorities which our learned brother has cited make it plain, we think, that this action is not an action for specific performance in the sense in which that term was used in the Court of Chancery. Sir *Edward Fry* (*Specific Performance*, 6th ed., pp. 16, 17) says :—" By specific performance is usually understood that peculiar, and, as it is called, extraordinary jurisdiction, which that Court exercised in respect of executory contracts as contrasted with executed contracts." " An executory contract " here " is one which is not intended between the parties to be the final instrument regulating their relations : an executed contract is one which is intended to be thus final." But that does not carry us very far, for the Court of Chancery had also jurisdiction " to give effect to a clear right " in appropriate cases (*Hermann Loog* v. *Bean* (1) ; *Puddephatt* v. *Leith* (2)), and that jurisdiction was exercised in such cases by means of both mandatory and prohibitive injunctions (*Puddephatt* v. *Leith*).

In this case it is said that art. 5A of the articles of association of the plaintiff Company, which in plain terms gives it a clear right against the defendant to delivery of 95 per centum of his fruit immediately after each variety thereof is ready, suitable and fit for harvesting or picking, is effective to do so because it regulates the rights and obligations of the members generally (*Companies Act* 1915 (Vict.), sec. 22 ; *Welton* v. *Saffery* (3) ; *Hickman* v. *Kent or Romney Marsh Sheepbreeders' Association* (4) ; *Bisgood* v. *Henderson's Transvaal Estates Ltd.* (5)). *Macfarlan* J. was of opinion that the clause was an unlawful restraint of trade, and also that it did not constitute a binding obligation upon the members of the Company within the provisions of sec. 22 of the *Companies Act*. We express no opinion upon these points. But we have not been convinced that the learned Judge was right upon either.

Assuming, however, the validity and efficacy of art. 5A, still the grant of an injunction is a matter for the discretion of the Court, though that discretion is, no doubt, a judicial discretion. The

(1) (1884) 26 Ch. D. 306, at p. 314.
(2) (1916) 1 Ch. 200.
(3) (1897) A.C. 299, at p. 315.
(4) (1915) 1 Ch. 881.
(5) (1908) 1 Ch. 743.

plaintiff claims specific performance of the provisions of this article, which means, we take it, a mandatory injunction or order to enforce the obligation so created. But the discretion of the Court of Chancery was "confined within well known rules" (*Ryan* v. *Mutual Tontine Westminster Chambers Association* (1)). It did not, for instance, exercise that discretion in the case of contracts of service, or for the sale of goods, or "where a continuous series of operations is involved," or where the agreement lacked "that element of mutuality" required to make it enforceable in a Court of equity, or where damages would afford an adequate remedy for any breach of agreement (*Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.* (2); *Fothergill* v. *Rowland* (3); *Donnell* v. *Bennett* (4); *Whitwood Chemical Co.* v. *Hardman* (5); *Ryan* v. *Mutual Tontine Westminster Chambers Association*; *Wolverhampton Corporation* v. *Emmons* (6); *Puddephatt* v. *Leith* (7); *Kennard* v. *Cory Bros. & Co.* (8); *Annual Practice* 1923, p. 852).

The plaintiff, in the alternative, claims a prohibitive injunction, that is, an injunction to restrain the defendant from delivering to any person or company, other than the plaintiff, the defendant's fruit crop for the current season, to the extent of 95 per centum of that crop. "If there had been a negative covenant . . . a Court of equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done" (*Doherty* v. *Allman* (9); *Donnell* v. *Bennett* (4)). But the jurisdiction does not "depend on the use of a negative rather than an affirmative form of expression." It depends upon the substance of the contract: upon whether the party sought to be restrained is doing or seeking to do something that is prohibited by the contract (*Wolverhampton and Walsall Railway Co.* v. *London*

(1) (1893) 1 Ch. 116, at p. 126.
(2) (1873) L.R. 16 Eq. 433.
(3) (1873) L.R. 17 Eq. 132.
(4) (1883) 22 Ch. D. 835.
(5) (1891) 2 Ch. 416.
(6) (1901) 1 K.B. 515.
(7) (1916) 1 Ch. 200.
(8) (1922) 1 Ch. 265, at p. 274.
(9) (1878) 3 App. Cas. 709, at pp. 719-720.

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and North-Western Railway Co. (1); *Whitwood Chemical Co.* v. *Hardman* (2); *Metropolitan Electric Supply Co.* v. *Ginder* (3)). Now, the present case does not, we think, fall within the class of case in which the party sought to be restrained is seeking to do something either expressly or impliedly prohibited by the contract, and an injunction should not issue on that ground. Art. 5A, to use the words of *Lindley* L.J. in *Whitwood Co.'s Case* (4), "is wholly an affirmative agreement." It stipulates affirmatively for a supply of fruit, and not negatively that the defendant would supply no one else (*Ginder's Case*).

Passing away, therefore, from this class of case, we find that the plaintiff is met with the further difficulty that the Court will not grant an injunction to restrain the breach of one or more stipulations of a contract in cases in which it would not compel specific performance, that is, issue a mandatory injunction or order that the contract be performed (*Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.* (1); *Fothergill* v. *Rowland* (5)). The Court "cannot refuse specific performance . . . and yet do the same thing by a roundabout method." In the present case we have, not a contract for the sale of goods, but an obligation to deliver goods to the Company for the purpose of carrying out a co-operative venture on the part of its members. The parties contemplated the formation of pools, an averaging of the returns, and payment to any member who delivered fruit of the average net price, according to the variety, quality and grade supplied by him. Such a transaction cannot, for the purpose of the exercise of the Court's discretion in granting or refusing injunctions, be differentiated, in point of principle, from the transactions dealt with in the cases which show that the Courts, as a matter of discretion, and perhaps as a matter of jurisdiction, ought not to issue injunctions to enforce the delivery of goods under contracts of sale. Consequently, in our opinion, art. 5A is not an obligation which the Court ought to enforce by mandatory injunction or whose breach it should restrain by prohibitive injunction. Moreover, the pecuniary loss to the

(1) (1873) L.R. 16 Eq., at p. 440.
(2) (1891) 2 Ch., at p. 427.
(3) (1901) 2 Ch., at p. 806.
(4) (1891) 2 Ch., at p. 426.
(5) (1873) L.R. 17 Eq. 132.

Company in this case is admittedly insignificant—at most threepence per case of fruit, according to the learned trial Judge, and the plaintiff attaches no importance to the recovery of that amount by judgment.

It was also said that neither a mandatory nor a prohibitive injunction should be granted in the present case because it would involve supervising a continuous series of operations, which the Court could not undertake and concerning which it could make no effective order. But art. 5A does not strike us as wanting in definiteness or precision. There is no more real difficulty in ascertaining whether a member of the Company has or has not supplied 95 per centum of his fruit, ready, suitable and fit for harvesting and picking within the times mentioned in the article than there would be in ascertaining whether a person erected a building in accordance with the minutiæ of specified plans (*Wolverhampton Corporation* v. *Emmons* (1); *Puddephatt* v. *Leith* (2); *Kennard* v. *Cory Bros. & Co.* (3)). And we are not much impressed with the objection that the articles of association "lack that element of mutuality" required to make them enforceable in a Court of equity. The business contemplated by the Company and its members was a co-operative venture. The members were to supply the fruit, and the Company (art. 124) was to handle and market the whole of the fruit supplied by its members. Undoubtedly it was reserved to the Company to refuse any fruit if the directors or the manager considered it advisable to do so. But that does not destroy the mutuality of the obligation imposed by the articles: it provides a business method of determining what fruit is, and what is not, suitable for the co-operative venture.

In this case, on the ground to which we have already adverted, an injunction should be refused and the appeal dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Wisewould & Duncan.*

Solicitor for the respondent, *J. W. McComas.*

B. L.

(1) (1901) 1 K.B. 515.

(2) (1916) 1 Ch. 200.

(3) (1922) 1 Ch. 265.